

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Washington, D.C. 20001-8002



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DATE: **July 10, 2000**

Case No.: **2000-INA-122**
CO No.: **P1999-NJ-02424408**

In the Matter of:

EL ESPECIAL SUPERMARKET
Employer

on behalf of

EMILIO PEREZ-FLORES
Alien

Certifying Officer: Dolores DeHaan
New York, NY

Appearance: Geoffrey Stewart, Esquire
Long Island City, NY

Before: Burke, Wood and Vittone
Administrative Law Judges

DECISION AND ORDER

Per Curiam This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at

the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

This decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file and any written arguments. 20 C.F.R. § 656.27 (c).

Statement of the Case

On December 20, 1996, the Employer filed an *Application for Alien Employment Certification* (ETA 750) to permit it to employ the Alien as a Supervisor, Cured-Meat Packing. (AF 1-5). Four résumés were sent to the Employer as a result of its recruitment efforts for this position by the State of New Jersey, Department of Labor. These résumés were: James J. Darvalics on June 9, 1999 (AF 32-34); Jack Kipnis on June 10, 1999 (AF 28-30); Nicolas Musico on June 14, 1999 (AF 35-37); and Sean Martinez on July 2, 1999 (AF 22-24). The Employer was informed in each instance that it was expected to contact and interview each applicant within two weeks.

In a recruitment report, dated July 23, 1999, the Employer stated that applicants Musico and Martinez were contacted by certified mail and return receipt on June 14, 1999, and that the other two applicants were contacted by mail on July 30, 1999. Reportedly, none of the applicants called to request an interview. (AF 40-41) The report was accompanied by copies of the letters sent to the applicants and certified mail receipts. These showed that Musico's and Martinez's letters were mailed on July 14, 1999 and Kipins' and Darvalica's were mailed on July 30, 1999. The letters advised the applicants to contact the Employer for an interview. (AF 22-37). The recruitment report was transmitted by the Employer's representative under a letter dated of August 3, 1999, although the recruitment report itself was dated July 23, 1999. (AF 41-42).

A Notice of Findings ("NOF") was issued by the CO on August 14, 1999, proposing to deny the application under §§ 656.24(b)(2)(ii), 656.21(b)(6) and 656.20 (c)(8). (AF 52-53). The CO found that Employer had failed to document job related reasons for its rejections of the four applicants and that it had not submitted evidence of its attempt to contact them by phone or letter. Employer was advised to submit evidence which consists of certified mail receipts accompanied by signed certified return cards and itemized telephone bills which shows applicants' telephone numbers and length of time the call lasted.

Employer submitted its Rebuttal on September 15, 1999. (AF 56-63). Employer responded that in addition to sending letters to the applicants each were contacted by telephone at the numbers listed on their resumes. (AF 62-63). No evidence of these calls was submitted other than the Employer's statement.

Upon receipt of the Employer's rebuttal, the CO issued a Final Determination dated October 7, 1999, denying certification on the basis, *inter alia*, that the Employer had failed to furnish itemized telephone bills to support his statements. (AF 74-75). Employer has requested a review of the denial of its application, and the record has been submitted to the Board for such purpose.

Discussion

The Board has held that implicit in §§ 656.21(b)(6) and 656.20 (c)(8) of the regulations is the requirement that an employer must make a "good faith" effort to recruit qualified U.S. workers for its job offer. *See, e.g., H.C. LaMarche Enterprises, Inc.*, 1987-INA-607 (Oct. 27, 1988). Thus, when apparently qualified U.S. workers have applied for the position, an employer must show a good faith effort to contact the applicants for an interview. Such effort requires more than one unsuccessful attempt at contact. *The Wreck Corp. d/b/a Gracious Home*, 1993-INA-35 (Mar. 8, 1995). It has been held in this regard that an employer has failed to show a good faith effort to contact a U.S. applicant where it reported only that it had sent him a letter and received no response but made no effort at a follow-up attempt by telephone. *H & H Wilson Sales Corp.*, 1991-INA-95, *Pro-Kern Industries*, 1991-INA-325 (Nov. 25, 1992).

In the instant case, the Employer does not dispute the qualifications for the position of any of the four applicants but maintains that the sole reason for their rejections was their failure to contact it for an interview. The Employer's recruitment report notes only that it had attempted to contact the applicants by certified mail.¹ Although it alleged in its rebuttal that it had also attempted telephone contact, it has not submitted the documentation to support that such calls were made. Indeed, the rebuttal is also woefully lacking in any details concerning any such phone calls, including the dates when made, the person(s) making the calls, whether the calls were answered and, if so, by whom. Written assertions which are not reasonably specific are not considered to be documentation. *Gencorp*, 1987-INA-659 (Jan. 13, 1988)

As the Employer has failed to show that it has made any good faith effort to recruit U.S. workers for its job opportunity, its application was properly denied, and the following order shall enter:

¹ We note that there is a problem with such contact that was not mentioned by the CO because of the amount of time which elapsed between the Employer's receipt of the resumes of applicants Kipins and Darvalics and the mailing of their interview letters. Good faith recruitment requires that qualified candidates be contacted in significantly less time than the almost two months involved here. *Loma Linda Foods, Inc.* 1989-INA-289 (Nov. 26, 1991) (*en banc*). We further note that the recruitment report was mailed four days after it mailed letters to two applicants and was apparently written seven days prior to such attempted contact, further evidencing lack of good faith in the recruiting effort.

ORDER

IT IS ORDERED that the Certifying Officer's denial of labor certification is **AFFIRMED..**

Entered at the direction of the panel:

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity in its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, DC 20001-8002**

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.